

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHARON OLDHAM

Claimant

VS.

J.C. PENNEY COMPANY, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 159,046 and
159,047

ORDER

ON the 2nd day of December, 1993, the application of the respondent and its insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Steven J. Howard, dated October 5, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Mark E. Kolich, of Kansas City, Kansas. Respondent and insurance carrier appeared by their attorney, Stephanie J. Warmund, of Overland Park, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

Docket No. 159,046

- (1) The nature and extent of claimant's disability, if any.
- (2) Claimant's entitlement to unauthorized medical expense.
- (3) Whether the testimony of Lanny Harris, M.D., concerning his findings concerning an office visit on October 31, 1991, should be considered.

Docket No. 159,047

- (1) Whether claimant sustained an occupational accident arising out of and in the course of her employment with the respondent during the period of September through December, 1990.
- (2) Whether Dr. Bohn's testimony should have been excluded pursuant to K.S.A. 44-515.
- (3) The nature and extent of claimant's disability, if any.
- (4) Claimant's entitlement to unauthorized medical expense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 159,046

- (1) The Appeals Board adopts the findings of fact and conclusions of law set forth by Administrative Law Judge Steven J. Howard in his Award dated October 5, 1993, that are not inconsistent with the findings and conclusions specifically set forth herein.

Claimant sustained an occupational injury to her right hand in June and July of 1991, while working as an order filler for the respondent, which for purposes of computation of this award will be treated as a July 3, 1991, date of accident as that appears to be the date of onset of claimant's symptomatology. The injury occurred due to the repetitive and constant use of the right hand required of claimant's job. The type of injury sustained is consistent with claimant's job duties and history of accident.

Claimant received conservative treatment from board certified orthopedic surgeon Lanny Harris, M.D. Dr. Harris diagnosed a strain to the hand. However, there were no objective findings to substantiate claimant's complaints. Due to the lack of objective findings, Dr. Harris found no objective evidence of physical impairment. Claimant was last seen by Dr. Harris on October 31, 1991. Dr. Harris testified that the normal results from EMG studies, bone scan, and rheumatoid scanning tests are not inconsistent with the diagnosis of a sprain or strain. The doctor also acknowledged that claimant's hand strain was consistent with her job duties and that a strain can be a chronic situation with continued use of the hand contributing to the chronicity of complaints.

Claimant also saw Nathan Schechter, M.D., a board certified orthopedic surgeon, on March 9, 1993. Dr. Schechter diagnosed tendinitis of the right hand due to repetitive use. Dr. Schechter found a functional impairment of 20 percent to the right hand and attributed the condition to claimant's work of pulling orders from shelves and bins while working for respondent. Dr. Schechter acknowledged that claimant had a normal EMG, bone scan and rheumatoid scanning test, but noted those particular tests do not rule out tendinitis as that condition is inflammation to the tendon sheath which is not subject to detection by those tests.

Based upon the record as a whole, the Appeals Board finds that claimant has experienced permanent injury and impairment to her right hand as a result of her work activities with the respondent. Based upon the physicians' testimony, claimant's impairment would range anywhere between 0 and 20 percent. Due to the continuing nature of claimant's complaints and symptoms, the Appeals Board finds that claimant has experienced a permanent injury and impairment of function. However, the Appeals Board is reluctant to adopt the 20 percent impairment rating of Dr. Schechter. The Appeals Board finds Dr. Schechter's rating to be somewhat high in light of the lack of objective findings and the AMA guides. The Appeals Board finds the impairment of function rating is more in the range of ten percent and finds that claimant should receive permanent partial disability benefits for the right hand injury based upon a split of the ratings.

(2) Claimant is entitled to an award for unauthorized medical expense not to exceed \$350.00 for the services rendered by Dr. Saffo and Dr. Schechter.

(3) At the deposition of Dr. Harris, claimant's counsel objected to the doctor testifying about the results of his examination of claimant on October 31, 1991. The record discloses that claimant made demand for medical records by letter dated November 26, 1991. A report dated November 13, 1991, was issued by the physician based upon an examination conducted October 31, 1991. The medical report was apparently received by counsel for the respondent in July of 1993, and provided to claimant's counsel approximately one month before Dr. Harris' deposition on August 10, 1993.

Claimant's counsel objected to Dr. Harris' testimony citing K.S.A. 1992 Supp. 44-515. The Appeals Board finds that this statute does not require the exclusion of the testimony of Dr. Harris under these circumstances. K.S.A. 1992 Supp. 44-515 provides:

"(a)...Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination with 15 days after such examination, which report shall be identical to the report submitted to the employer....

(c) Unless a report is furnished as provided in subsection (a)...the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made."

When considering this issue, another statute to be considered is K.S.A. 1992 Supp. 44-523 which provides that the Director and Administrative Law Judge shall not be bound by technical rules of procedure but shall give the parties reasonable opportunity to be heard and present evidence.

The Appeals Board is mindful of the mandatory language of K.S.A. 44-515, and concerned whether the statute can be reasonably construed. The literal reading of the statute requires the production of a medical report within 15 days of evaluation when a report is requested. The statute does not address whether the demand is required before or after the evaluation, nor the situation when the health care provider is unable, due to justifiable circumstances, to provide its report within the 15 day period. There are many other practical eventualities that do not fit well within the strictures of this statute, such as where a party requests the report after the evaluation, but the party is unable, despite a good faith attempt, to deliver the report before expiration of the allotted 15 day period.

A primary goal of the Workers Compensation Act is to encourage and facilitate the sharing of information and evidence in order to promote the prompt resolution of claims so as to prevent needless litigation and expense. Whereas a literal reading of K.S.A. 1992 Supp. 44-515 might require a party to resubmit the claimant for multiple medical evaluations to meet the deadlines set forth by this statute, the Appeals Board finds that such interpretation is unreasonable and contrary to the spirit and intent of the Act.

The Appeals Board finds the primary purpose of K.S.A. 1992 Supp. 44-515 is to

prevent a party from withholding a medical report that, in the absence of its production, might cause prejudice or unfairness to the adverse party. Although there may be others, two situations in which it is clear that prejudice would result is when the report contains information that could be construed as adverse to the party withholding same, and when failure to produce such report subjects a party to unfair surprise.

The Appeals Board finds that in the absence of finding unfair surprise or prejudice directly caused by the failure or delay in providing a health care provider's report, the testimony of the health care provider should be permitted. Such is the goal and intent of the Act.

Respondent's counsel furnished claimant a copy of Dr. Harris' report approximately one month before the doctor's deposition. Claimant was not prejudiced nor unfairly surprised due to the delay in receipt of the medical report. The spirit of K.S.A. 1992 Supp. 44-515 has been met and Dr. Harris' testimony is properly considered. It is also noted that claimant's counsel knew that his client was being treated by Dr. Harris and, therefore, had the opportunity to request and obtain the medical records from the doctor himself well in advance of the deposition.

Docket No. 159,047

(1) The Appeals Board adopts the findings of fact and conclusions of law set forth by Administrative Law Judge Steven J. Howard in his Award dated October 5, 1993, that are not inconsistent with the findings and conclusions specifically set forth herein.

Claimant sustained an occupational injury to her left foot by reason of repetitive mini-trauma during the period September 1990 through December 1990, which for purposes of computation of this award will be based upon a December 31, 1990, date of accident. Claimant's foot injury is consistent with her job duties that require her to be on her feet most of the day climbing ladders and pulling orders.

(2) Claimant objected to the deposition of Dr. Bohn for the reason claimant's counsel did not receive Dr. Bohn's report from respondent within 15 days of June 28, 1993, the date Dr. Bohn examined and evaluated the claimant. By letter dated July 2, 1993, claimant's counsel requested a copy of the report from respondent's counsel. Respondent's counsel received Dr. Bohn's report on July 16, 1993, and provided a copy of it to claimant's counsel on July 22, 1993. Dr. Bohn's deposition was taken on September 16, 1993. Claimant's counsel objected to Dr. Bohn's testimony citing K.S.A. 1992 Supp. 44-515.

Respondent's counsel furnished claimant a copy of Dr. Bohn's report within 15 days of its receipt and approximately nine weeks before the doctor's deposition was taken. The Appeals Board finds the delay in providing Dr. Bohn's report has not prejudiced claimant nor did it result in unfair surprise. Therefore, Dr. Bohn's testimony is properly considered.

(3) Claimant's counsel selected Nathan Schechter, M.D., a board certified orthopedic

surgeon, to evaluate claimant's foot. Dr. Schechter diagnosed claimant as having nerve root impingement of the foot causing pain upon weight bearing and climbing. Dr. Schechter found a 25 percent impairment of function to the foot. Dr. Schechter believed that the prolonged standing, walking and climbing required of claimant's job caused the injury.

Respondent selected William W. Bohn, M.D., a board certified orthopedic physician, to examine and evaluate the claimant. Dr. Bohn's evaluation was conducted on June 28, 1993. Dr. Bohn found no objective evidence of injury and did not feel that claimant suffered from tarsal tunnel syndrome. Dr. Bohn told claimant to treat her foot symptomatically and avoid activities that caused pain. Dr. Bohn did not think that claimant's complaints were caused by her work since the right foot was not symptomatic. On cross-examination, however, it was pointed out that Dr. Bohn's earlier written report indicated that he felt claimant had a nerve compression in her foot that was caused by an unknown source. Dr. Bohn believed claimant's complaints were not work-related due to the absence of objective findings. Dr. Bohn likewise believed there was no impairment due to lack of objective findings.

Based upon the record as a whole, the Appeals Board finds that claimant has experienced permanent injury and impairment to her left foot as a result of her work activities with respondent. Based upon the physicians' testimony, claimant's impairment would range anywhere from 0 to 25 percent. Based upon the claimant's continued complaints of pain and symptomatology, the Appeals Board does not agree with the finding of Dr. Bohn of no impairment. However, due to the lack of objective findings and the AMA guides, the Appeals Board finds that Dr. Schechter's 25 percent rating is somewhat high and that claimant's impairment of function to the left foot is more in the range of 12.5 percent which is a split of the ratings. Therefore, the Appeals Board finds that claimant is entitled to permanent partial disability benefits based upon a 12.5 percent impairment of function to the left foot.

(4) Claimant is entitled to an award for unauthorized medical expense for the services rendered to her by Dr. Schechter, which total \$529.00 for both this claim and Docket No. 159,046. Accordingly, claimant is entitled to an award for unauthorized medical services not to exceed \$350.00 in this docketed claim.

AWARD

Docket No. 159,046

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Order of Administrative Law Judge Steven J. Howard, dated October 5, 1993, is modified, as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the claimant, Sharon L. Oldham, and against the respondent, J.C. Penney Company, Inc., and its insurance carrier, Liberty Mutual Insurance Company. The claimant is entitled to 3.42

weeks of temporary total disability benefits at the rate of \$289.00 per week or \$988.38, followed by 14.66 weeks of permanent partial disability benefits at the rate of \$289.00 per week, or \$4,236.74, for a ten percent loss of use of the right hand, making a total award of \$5,225.12. As of the date of this order, the entire award is due and owing and ordered paid in one lump sum less amounts previously paid.

All other orders of Administrative Law Judge Steven J. Howard in his Award dated October 5, 1993, are adopted and incorporated herein by reference as if specifically set forth herein.

Docket No. 159,047

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Order of Administrative Law Judge Steven J. Howard, dated October 5, 1993, is modified, as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the claimant, Sharon L. Oldham, and against the respondent, J.C. Penney Company, Inc., and its insurance carrier, Liberty Mutual Insurance Company. The claimant is entitled to 15.63 weeks of permanent partial disability benefits at the rate of \$278.00 per week totaling \$4,345.14, for a 12.5 percent loss of use of the left foot. As of the date of this order, the entire award is due and owing and is ordered paid in one lump sum less amounts previously paid.

All other orders of Administrative Law Judge Steven J. Howard in his Award dated October 5, 1993, are adopted and incorporated herein by reference as if specifically set forth herein.

IT IS SO ORDERED.

Dated and mailed this ____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Steven J. Howard, Administrative Law Judge
Mark E. Kolich, P.O. Box 171855, Kansas City, Kansas 66117-1855
Stephanie Warmund, 10561 Barkley, Suite 410, Overland Park, Kansas 66212
George Gomez, Director